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MAYBANK ISLAMIC BHD v. WWE HOLDINGS BHD

COURT OF APPEAL, PUTRAJAYA
IDRUS HARUN JCA
MARY LIM JCA
ASMABI MOHAMAD JCA

B

[CIVIL APPEAL NO: B-02(IM)-57-07-2016]
18 MAY 2017

CIVIL PROCEDURE: *Proceedings – Garnishee – Enforcement of judgment debt – Appeal against High Court's decision to set aside garnishee absolute order granted by Senior Assistant Registrar – Whether there was conclusive debt in existence or accruing – Rules of Court 2012, O. 49*

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CIVIL PROCEDURE: *Judgments and orders – Judgment debt – Enforcement of judgment debt through garnishee proceedings – Appeal against High Court's decision to set aside garnishee absolute order granted by Senior Assistant Registrar – Whether there was conclusive debt in existence or accruing – Whether interim certificate could be superseded by letter confirming and acknowledging debt – Whether parties could avoid order by reason of pending counterclaim – Rules of Court 2012, O. 49*

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The appellant had granted Ibsul Holdings Sdn Bhd, the judicial debtor ('the JD'), various banking facilities and in consideration of which, the JD executed a deed of assignment. Under the said deed, the JD assigned to the appellant all monies due and payable to the JD under a contract between the JD and the respondent relating to a project to build a water treatment plant. The JD notified the respondent of the assignment by way of notice of assignment cum irrevocable instruction. When the JD defaulted on the arrangements relating to the banking facilities, the appellant sued the JD. A consent judgment was entered and after making some payments, the JD defaulted. The appellant commenced garnishee proceedings seeking to garnish the sum of RM3,892,016.77 and RM12,117,646.88 stated in the respondent's letter ('the letter') which allegedly confirmed and acknowledged that it owed the JD the said sum. The Senior Assistant Registrar ('the SAR') granted a garnishee absolute order ('the order') but, on appeal, the order was set aside by the High Court. Based on Her Ladyship's interpretation of the letter, the High Court Judge ('the HCJ') held that, *inter alia*, there was no conclusive debt already in existence or accruing from the respondent to the JD. The HCJ further held that (i) taking the view that an interim certificate could only be superseded by another subsequent interim certificate, interim certificate no. 27 did not show that the JD was indebted to the respondent in the sum of RM11,105,662.83; and (ii) there was a counterclaim by the respondent which was pending in an arbitration between the respondent and the JD and until the arbitration yielded an award, there was no legal debt due and accruing from the respondent to the JD. Hence, the present appeal.

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Held (allowing appeal; setting aside decision of High Court)
Per Mary Lim JCA delivering the judgment of the court:

(1) The letter, captioned 'agreement on final variation order amount', was from the respondent and was sent to the JD. In this letter, the respondent (i) acknowledged the cooperation of the JD during the clarification and negotiation in finalising the variation orders; (ii) told the JD that it concurred with the authenticity of the JD's variation claims; and (iii) told the JD that the concluded variation works amounted to RM12,117,646.88. This meant that the existence and extent of the variation works completed by the JD was not an issue and the respondent must pay the JD for such works. A debt existed and the respondent was indebted to the JD for the variation works. (paras 14, 15 & 16)

(2) The letter was written after the parties had opportunities to clarify and negotiate. At this time, interim certificate no. 27 had been issued and it showed that the JD was indebted to the respondent in the sum of RM11,105,662.83. Yet the respondent wrote the letter, stating its evaluation of the JD's variation works. Contrary to the High Court's findings, for the purposes of establishing whether a debt existed under the terms of O. 49 of the Rules of Court 2012 ('the ROC'), the contents of the letter clearly showed that interim certificate no. 27 was superseded by this letter. (paras 18 & 19)

(3) There was no basis for the High Court's view that the letter could not supersede interim certificate no. 27; that such an interim certificate could only be superseded by another interim certificate. This was erroneous. The High Court was not sitting in pronouncement on the matter of the variation works or even the dispute between the respondent and the JD. All that was required of the High Court was to determine whether there was a debt owing from the respondent to the JD. The agreement and acknowledgment of the JD was immaterial for the purpose of O. 49 of the ROC. (para 20)

(4) Neither the JD nor the respondent was entitled to avoid the order by reason of the counterclaim. It was irrelevant that the respondent may have a counterclaim against the JD arising from the contract works. Any dispute by the JD on the amount or any dispute between the parties over the respondent's counterclaim were matters for determination and resolution in the arbitration proceedings. With the notice of assignment cum irrevocable instruction, the respondent agreed and acknowledged that it would pay all sums due and payable to the JD under the project to the appellant. Where the assignment is absolute, which was the case in the present appeal, the transfer of the debt from the JD to the

A respondent did not allow the respondent to retain any rights or interest in the debt assigned. The SAR was right to order that the order be pronounced absolute. The order of the SAR was reinstated (paras 23, 24, 25, 26 & 27)

Bahasa Malaysia *Headnotes*

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Perayu telah memberi Ibsul Holdings Sdn Bhd, penghutang penghakiman ('PP'), beberapa kemudahan perbankan dan sebagai balasan, PP memeterai satu surat ikatan penyerahakkan. Bawah surat ikatan ini, PP menyerahakkan kesemua wang yang terhutang dan mesti dibayar kepada PP bawah satu kontrak antara PP dan responden berkenaan projek membina loji pembersihan air. Penghutang penghakiman memaklumkan responden akan penyerahakkan ini melalui notis penyerahakkan yang juga arahan yang tidak boleh ditarik balik. Apabila PP ingkar dalam aturan kemudahan perbankan, perayu menyaman PP. Satu penghakiman persetujuan direkodkan dan selepas membuat beberapa bayaran, PP ingkar. Perayu memulakan prosiding garnis untuk menggarnis jumlah RM3,892,016.77 dan RM12,117,646.88 yang dinyatakan dalam surat responden ('surat tersebut') yang dikatakan mengesahkan dan mengakui bahawa responden berhutang jumlah tersebut pada PP. Penolong Kanan Pendaftar ('PKP') mengeluarkan perintah garnis mutlak ('perintah') tetapi, atas rayuan, perintah ini diketepikan oleh Mahkamah Tinggi. Berdasarkan tafsiran beliau terhadap surat tersebut, Hakim Mahkamah Tinggi ('HMT') memutuskan, antara lain, tiada hutang muktamad yang wujud atau terakru oleh responden pada PP. Hakim Mahkamah Tinggi memutuskan lagi bahawa, (i) berpandangan satu sijil interim hanya boleh digantikan oleh satu lagi sijil interim terkemudian, sijil interim no. 27 tidak menunjukkan PP berhutang sebanyak RM11,105,662.83 pada responden; dan (ii) terdapat tuntutan balas oleh responden yang belum selesai dalam satu timbang tara antara responden dan PP dan hinggalah timbang tara tersebut mengeluarkan award, tiada hutang perundangan yang terhutang dan terakru oleh responden pada PP. Maka timbul rayuan ini.

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G **Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi)**

Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Surat tersebut, yang bertajuk 'agreement on final variation order amount', adalah daripada responden dan dihantar kepada PP. Dalam surat ini, responden (i) mengakui kerjasama PP semasa penjelasan dan rundingan dalam menyelesaikan perintah variasi; (ii) memaklumkan PP tentang persetujuannya dengan kesahan tuntutan-tuntutan variasi PP; dan (iii) memaklumkan PP akan kerja-kerja variasi yang diselesaikan yang berjumlah RM12,117,646.88. Ini bermaksud kewujudan dan tahap kerja-kerja variasi yang disempurnakan oleh PP bukan satu isu dan responden mesti membayar kepada PP bagi kerja-kerja tersebut. Satu hutang wujud dan responden berhutang pada PP bagi kerja-kerja variasi.

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(2) Surat tersebut ditulis selepas pihak-pihak berpeluang untuk mengemukakan penjelasan dan berunding. Pada masa itu, sijil interim telah dikeluarkan dan menunjukkan PP berhutang pada responden dalam jumlah RM11,105,662. Namun responden menulis surat tersebut, menyatakan penilaiannya terhadap kerja-kerja variasi PP. Bertentangan dengan dapatan-dapatan Mahkamah Tinggi, bagi tujuan membuktikan sama ada satu hutang wujud bawah terma-terma A. 49 Kaedah-Kaedah Mahkamah 2012 ('KKM'), kandungan surat ini jelas menunjukkan sijil interim no. 27 digantikan oleh surat.

(3) Tiada asas bagi dapatan Mahkamah Tinggi bahawa surat tersebut tidak boleh menggantikan sijil interim no. 27, dan sijil interim demikian hanya boleh diganti oleh satu lagi sijil interim. Ini satu kekhilafan. Mahkamah Tinggi tidak bersidang untuk mengisytiharkan hal perkara kerja-kerja variasi atau pertikaian antara responden dan PP. Yang perlu dilakukan oleh Mahkamah Tinggi adalah memutuskan sama ada terdapat hutang terakru oleh responden pada PP. Persetujuan dan pengakuan PP tidak penting bagi maksud A. 49 KKM.

(4) Responden mahupun PP tidak berhak mengelak perintah tersebut dengan alasan wujud tuntutan balas. Fakta responden mempunyai tuntutan balas terhadap PP susulan kerja-kerja kontrak tidak relevan. Apa-apa pertikaian oleh PP terhadap jumlah atau apa-apa pertikaian antara pihak-pihak dalam tuntutan balas responden adalah hal-hal perkara bagi pemutusan dan penyelesaian dalam prosiding timbang tara. Dengan adanya notis penyerahakkan yang juga arahan yang tidak boleh ditarik balik, responden bersetuju dan mengakui bahawa responden akan membayar kesemua jumlah yang terhutang dan perlu dibayar kepada PP bawah projek kepada perayu. Apabila penyerahakkan berbentuk mutlak, seperti dalam rayuan ini, pindahan hutang daripada PP kepada responden tidak membenarkan responden memegang apa-apa hak atau kepentingan dalam hutang yang diserahakkan. Penolong Kanan Pendaftar bertindak betul dalam mengarahkan agar perintah tersebut diisytiharkan mutlak. Perintah PKP dihidupkan semula.

Case(s) referred to:

HSBC Bank Malaysia Bhd v. LH Timber Products Sdn Bhd & Ors [2005] 8 CLJ 249 HC ***(refd)***

Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd & Anor [1988] 2 CLJ 194; [1988] 1 CLJ (Rep) 645 HC ***(refd)***

Mohamed Tawfik Tun Dr Ismail v. HLG Credit Sdn Bhd & Anor [2012] 2 CLJ 65 CA ***(refd)***

Saw Swan Kee v. Sim Lim Finance (M) Bhd [1985] 2 CLJ 356; [1985] CLJ (Rep) 286 FC ***(refd)***

Tapp v. Jones (1875) LR 10 QB 591 ***(refd)***

Ted Bates (M) Sdn Bhd v. Balbir Singh Jholl [1976] 1 LNS 157 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 49 rr. 1, 3
Rules of the High Court 1980, O. 49

For the appellant - Sathya Kumardas & Koo Yin Soon; M/s Shearn Delamore & Co
For the respondent - S Shanthi Supramaniam & Terence Loh; M/s Belden

[Editor's note: For the High Court judgment, please see Maybank Islamic Bhd v. Ibsul Holdings Sdn Bhd; WWE Holdings Bhd (Party Garnishee) [2017] 1 LNS 237 (overruled).]

Reported by Najib Tamby

JUDGMENT

Mary Lim JCA:

Introduction

[1] This appeal relates to the enforcement of a judgment debt of the sum of RM12,117,646.88 which is due and owing from the judgment debtor, Ibsul Holdings Sdn Bhd ("JD") to the appellant. The appellant sought to enforce the judgment debt through garnishee proceedings under O. 49 of the Rules of Court 2012. The learned judge allowed the respondent's appeal against the order of the learned SAR who had granted a garnishee order absolute on 11 January 2016. Upon proper consideration, we unanimously allowed the appeal, set aside the decision of the High Court and reinstated the decision of the learned SAR. These are our reasons in full.

Brief Facts

[2] The appellant had granted the JD various banking facilities in consideration of which the JD executed a deed of assignment dated 15 October 2002 (deed). By this deed, the JD assigned to the appellant all monies due and payable to the JD under a contract between the JD and the respondent relating to a project to build a water treatment plant in Jelutong, Penang. The JD notified the respondent of the assignment by way of notice of assignment cum irrevocable instruction dated 22 February 2005.

[3] When the JD defaulted on the arrangements relating to the banking facilities, the appellant sued the JD. A consent judgment was entered on 10 February 2012. The JD made some payments but then defaulted. As at 13 August 2015, the sum outstanding under the consent judgment was RM57,507,246.95.

[4] The appellant commenced garnishee proceedings seeking to garnish the sum of RM3,892,016.77 pursuant to interim certificates nos. 12, 14, 15, 16 and 26 as well as a sum of RM12,117,646.88 stated in the respondent's letter dated 25 October 2007 ("25 October 2007 letter"). In the 25 October

2007 letter, the respondent is said to have confirmed and acknowledged that it, the respondent, owed the JD a sum of RM12,117,646.88 on account of concluded works on variation orders. The learned SAR granted a garnishee absolute order.

Decision Of The High Court

[5] This order absolute was set aside on appeal by the learned High Court Judge on the primary ground that at the material time, there was no conclusive debt already in existence or accrued from the respondent to the JD. Her Ladyship reached this conclusion based on her interpretation and construction of the 25 October 2007 letter. It was the court's view that such letter was not evidence of a conclusive debt because there was no acceptance by the JD; and because there was a counterclaim by the respondent which was pending in arbitration between the respondent and the JD. Until the arbitration yielded an award, there was no legal debt due and accruing from the respondent to the JD. Her Ladyship also rejected the appellant's contention that interim certificate no. 27 which showed that the JD is indebted to the respondent in the sum of RM11,105,662.83 had been superseded by the 25 October 2007 letter; taking the view that an interim certificate can only be superseded by another subsequent interim certificate. According to Her Ladyship, the interim certificate "cannot be superseded by a letter written by one party which has not been accepted by the other party." In fact, it was the court's view that the application was "premature."

Our Decision

[6] With respect, we disagree. Order 49 of the Rules of Court 2012 provides for the attachment of debt due to a judgment debtor. It reads as follows:

> 1. (1) Where a person (who is referred to as "the judgment creditor" in this Order) has obtained a judgment or order for the payment of money by some other person (who is referred to as "the judgment debtor" in this Order), not being a judgment or order for the payment of money into Court, **and any other person** within the jurisdiction (who is referred to as **"the garnishee"** in this Order), **is indebted to the judgment debtor**, the Court may, subject to the provisions of this Order and of any written law, **order the garnishee to pay the judgment creditor the amount for any debt due or accruing due to the judgment debtor from the garnishee**, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.
>
> (2) …
>
> (3) In this Order, "any debt due or accruing due" includes a current or deposit account with a bank or other financial institution, whether or not the deposit has matured and notwithstanding any restriction as to the mode of withdrawal.
>
> (emphasis added)

[7] These provisions are substantially the same as those found under O. 49 of the old Rules of the High Court 1980. The authorities under the old procedural rules remain relevant. Two such authorities are *Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd & Anor* [1988] 2 CLJ 194; [1988] 1 CLJ (Rep) 645; [1988] 1 MLJ 434 and *Saw Swan Kee v. Sim Lim Finance (M) Bhd* [1985] 2 CLJ 356; [1985] CLJ (Rep) 286; [1985] 1 MLJ 221.

[8] In *Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd*, Lim Beng Choon J more than ably explained the operation of O. 49, identifying the following principles after examining several relevant cases:

> (1) No garnishee order can be made unless some person, at the time when the order is made, is indebted to the judgment debtor. If there be a debt *in presenti*, of course an order can be made to attach the debt.
>
> (2) If there is not a debt payable *in presenti*, but there is a debt in existence, *debitum in presenti*, but payable in the future, such an order can still be made with regard to the debt whether legal or equitable.
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> (3) The words "or accruing" are intended to apply to those cases in which there are *debita in praesenti*, *solvenda in futuro* (debts owed at present time payable in the future). It is not enough to show that it very probable that there soon will be a debt; it must be shown that there is a debt.

[9] When dealing with competing claims, cross-claims or the right to set off in garnishee proceedings, the Federal Court's decision in *Saw Swan Kee v. Lim Finance* (*supra*) must be considered. In that appeal, the issue was whether a garnishee has a right to set off against the debt attached by the garnisher a debt that the judgment debtor owes the garnishee. In other words, the judgment debtor owes both the garnisher and the garnishee. The Federal Court decided that in garnishee proceedings, the garnishee may set off against the debt attached a debt owed by the debtor to the garnishee provided the debt owed to the garnishee exists before the order *nisi* was made. On the facts in that appeal, the Federal Court was "unable to find any credible evidence to show that on the relevant date (11 January 1983) any actionable debt was in existence and payable to the garnishee from the judgment debtor." For that reason, the Federal Court held that:

> As there was at the material time no debt due and payable to the garnishee from the judgment debtor, the authorisation to pay by the judgment debtor does not have any effect ...

[10] From the terms of r. 1 which is fortified by r. 3, a debt which is payable in the future remains a debt liable to be attached under O. 49 r. 1. Blackburn J ruled in *Tapp v. Jones*; *Poley, Garnishee* (1875) LR 10 QB 591, 592 that the Legislature had in view both present debt and future debt, *debita in praesenti, solvenda in futuro*, for it speaks in the earlier part of the section of "debts owing and accruing." Of significant importance is what

His Lordship added, that:

> ... it is quite clear that the garnishee cannot be bound to pay his debt before it is due; so that we must read "the debt due" as meaning either the debt when due, or the debt then due. If the former reading be the correct one, then the present order was quite right; if the latter, then it was premature. I have come to the conclusion that the true construction is that there is power to make an order against the garnishee for payment of his debts as and when they become payable, instead of making a fresh order as each falls due.

[11] Field J further explained that the object of garnishee proceedings is to give to a judgment creditor who cannot levy upon the chattels of his debtor a remedy against his debts. The section begins by speaking of the garnishee being "indebted" to the judgment debtor … But the section goes on to speak of "debts owing or accruing." His Lordship opined that:

> The object is, as the next section shews, to "bind such debts" for the benefit of the judgment creditor. …

[12] Order 49 allows for the debt due from one person to another to be attached or garnished in favour of a third person. In the instant appeal, it allows the debt, if it exists, due or accruing due from the respondent to the JD to be attached or garnished in favour of the appellant, the judgment creditor. It is therefore paramount that the existence of a debt owed by the respondent to the judgment debtor must first be established, that the debt must be due or accruing due, before attachment can arise.

[13] Despite these clear tests, once in a while, the problem of identifying whether a debt exists, whether the debt is due or is accruing, continues to present some difficulty in application and in the exercise of discretion. The present appeal illustrates that.

[14] As we see it, the issue revolves around the construction of the 25 October 2007 letter. This letter captioned "agreement on final variation order amount" is initiated by the respondent and it is sent to the JD. It is quite evident from the contents of the letter that the subject matter in issue between the respondent and the JD concerns the value of variation works completed by the JD. In this letter, the respondent takes a position on the JD's claims for such works and the value of the same. This is what the respondent says about both aspects of the variation works including what the "final variation order amount" is:

> Based on the following related clauses on variation orders, **we concurred the authenticity of your variation order claims**. The summary of this variation orders is as per Appendix 1 & 2. The related clauses in Conditions of Contract on variation orders are:
>
> (a) Clauses 5(a)(i) & (ii)
>
> (b) Clauses 5(b), (c) & (d)

(c) Clause 24(a) - (d)

(d) Clause 25(a) - (f)

Variation order in Appendix 1 relates to items involving additional and change in scope of work, while Appendix 2 involves variation works under re-measurement. **The concluded variation works amounts to RM 12,117,646.88**.

We would also like to take this opportunity to extend our appreciation on your cooperation during clarification and negotiation in finalising this variation orders. Attached please find "Acknowledgement and Agreement Form" on "Final Variation Orders Amount" to be signed in three (3) original copies.

Upon signing, please return two (2) copies and retain one copy for your reference. You may collect one (1) complete set of variation order details breakdown in our site office.

(emphasis added)

[15] It is patently obvious from the above that the respondent has:

(i) acknowledged the cooperation of the JD during the clarification and negotiation in finalising the variation orders;

(ii) told the JD that it concurs with the authenticity of the JD's variation claims; and

(iii) also told the JD that the concluded variation works amounts to RM12,117,646.88.

[16] This must necessarily mean that the existence and extent of variation works completed by the JD is not an issue as the respondent concurred with the JD on the "authenticity of the variation claims." This further means that the respondent must pay the JD for such works. The respondent therefore owes the JD payment for such works. In simple terms, the respondent is indebted to the JD for the variation works; a debt exists. The next question is whether the amount owed is ascertained.

[17] For this and for the purposes of O. 49, it is what the respondent next tells the JD that brings the matter into sharp focus. The respondent acknowledges and states in this letter that the concluded variation works amounts to RM12,117,646.88. This is the respondent's valuation of the JD's variation works and this is what it describes as the "final variation order amount." At this point, the debt crystallises with the amount determined by the respondent itself. From this point, the debt is due from the respondent to the JD.

[18] These statements of positions on the existence and the final amount of the variation works are what the respondent itself placed as the value of the variation works executed by the JD. While the respondent may have asked

for the acknowledgement and agreement of the JD, the respondent's position taken in this letter is an open, unreserved statement almost akin to an admission of the existence and value of variation works done by the JD. The Federal Court's decision in *Ted Bates (M) Sdn Bhd v. Balbir Singh Jholl* [1976] 1 LNS 157; [1979] 2 MLJ 257 as applied in *HSBC Bank Malaysia Bhd v. LH Timber Products Sdn Bhd & Ors* [2005] 8 CLJ 249; [2005] 6 MLJ 625, on the law on open letters of communication written without reservations, is relevant to find that in the present appeal, the contents of the 25 October 2007 letter amounts to an acknowledgment by the respondent that it owes the JD, the sum of RM12,117,646.88 for variation works completed by the JD. It is pertinent to note that this letter was written after the parties had opportunities to clarify and negotiate as expressed in the sentence - "We would also like to take this opportunity to extend our appreciation on your cooperation during clarification and negotiation in finalising this variation orders."

[19] At this time, interim certificate no. 27 also has already been issued. It is dated 15 December 2006 and it showed that the JD is indebted to the respondent in the sum of RM11,105,662.83. Yet, the respondent wrote this letter on 25 October 2007 stating its evaluation of the JD's variation works. As mentioned in the letter itself, this is obviously because of the "clarification and negotiation" between the parties "in finalising" the variation orders. Contrary to the High Court's findings, for the purposes of establishing whether a debt exists under the terms of O. 49, the contents of the 25 October 2007 letter clearly show that interim certificate no. 27 has indeed been superseded by this letter.

[20] We do not find any basis for the High Court's view that the 25 October 2007 letter could not supersede interim certificate no. 27; that such an interim certificate can only be superseded by another interim certificate. With respect, this is erroneous. The High Court is not sitting in pronouncement on the matter of the variation works or even the dispute between the respondent and the JD. All that is required of the High Court is to determine whether there is a debt owing from the respondent to the JD. If there is one, and it is clear that there is from the respondent's plain statements in this letter, then the conditions of O. 49 are met. The agreement and acknowledgment of the JD is immaterial for the purpose of O. 49 although it may arguably be easier for the appellant to make its case where the JD agrees with the respondent's positions, especially on the amount.

[21] For the same reasons, we cannot agree with the submissions of the respondent that there cannot be any payment due and consequently any debt in existence because the sum of RM12,117,646.88 for the variation works had never been certified. Again, O. 49 does not require such determination. It only requires the establishment of a debt and that the debt is due or accruing due; that is, it is payable but it may be at a deferred date in the future.

[22] It is our respectful view that the absence of the JD's concurrence on the respondent's letter does not diminish the meaning and implications of the letter. In fact, even if the JD disagrees with the respondent's statements in this 25 October 2007 letter, the unreserved and unequivocal position taken by the respondent that the variation works are genuine or authentic, that the JD must be paid for such works, and that the final variation order amount is the sum of RM12,117,646.88 as finalised by the respondent, remains.

[23] It is also irrelevant that the respondent may have a counterclaim against the JD, arising from the contract works. Any dispute by the JD on the amount or any dispute between the parties over the respondent's counterclaim are matters for determination and resolution in the arbitration proceedings between the parties. That is a matter of contractual choice and the parties have decided to take the disputes and differences to arbitration. That choice, however, does not change the conclusions reached above. The respondent clearly acknowledged that it owes the JD a debt of RM12,117,646.88 as payment for the variation works. Neither the JD nor the respondent is entitled to avoid the garnishee order by reason of the counterclaim. This was expressed by the Federal Court in *Saw Swan Kee v. Sim Lim Finance (M) Berhad (supra)* discussed earlier and where Mohamed Azmi FJ observed that "… a garnishee cannot set off against the debt attached, a debt owing to him from the judgment creditor (garnisher); but he can avail himself of a set off against the judgment debtor, which existed when the order *nisi* was made." There is no evidence that the set off has been established before the order *nisi* was made in the present appeal. That set off, as would be represented by the counterclaim against the JD, rightly is yet to be determined and it would be dealt with in the arbitration and not, against this debt which is liable to be attached under O. 49. Because it is yet to be determined, the respondent cannot set off, or raise it to diminish the appellant's right to garnish the assigned debt.

[24] With the notice of assignment cum irrevocable instruction, the respondent has agreed and acknowledged that it will pay all sums due and payable to the JD under the project to the appellant. This absolute assignment entitles the appellant to enforce the consent judgment by way of garnishee proceedings - see *Mohamed Tawfik Tun Dr Ismail v. HLG Credit Sdn Bhd & Anor* [2012] 2 CLJ 65; [2012] 2 MLJ 626. Although the issue before the Court of Appeal in that case was whether upon absolute assignment of the judgment debt which forms the basis of the bankruptcy proceedings, the assignee can be substituted for the assignor as the judgment creditor in the pending bankruptcy proceedings, the observations of the court are relevant in this appeal. Answering in the affirmative, Ramly JCA (as His Lordship then was) held that in an absolute assignment, not only is the total debt assigned but likewise all advantages and benefits of the debt. Consequently, the assignee was not legally impeded from substituting the assignor as the judgment creditor in the bankruptcy proceedings against the appellant.

[25] What the respondent had sought to do in the proceedings below really was to argue that because the claims between itself and the JD were unresolved especially because it had a counterclaim against the JD which is yet to be determined in the pending arbitration proceedings, the sum or debt that it owes the JD in respect of the variation works has not accrued and cannot be garnished. The decision of the Court of Appeal in *Mohamed Tawfik bin Tun Dr Ismail* illustrates the need to keep, quite separate and distinct the respective rights between the different sets of parties: between the respondent and the JD, between the JD and the appellant; and between the respondent and the appellant. Where the assignment is absolute, which is the case in the present appeal, the transfer of the debt from the JD to the respondent does not allow the respondent to retain any rights or interest in the debt assigned.

[26] Consequently, the learned SAR was right to order that the garnishee order *nisi* be pronounced absolute.

[27] For all the foregoing reasons, we allowed the appeal, set aside the decision of the High Court; and reinstated the order of the learned SAR made on 11 January 2016.